identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: APR 2 0 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a biomedical researcher. At the time she filed the petition, the petitioner was a senior research associate at the [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on November 17, 2010. In an accompanying statement, counsel contended, at length, that the petitioner's evidence establishes her eligibility for the waiver. Counsel did not, however, discuss the evidence itself or explain how it establishes eligibility. The materials submitted with the petition consisted of copies of the petitioner's academic degrees, the petitioner's *curriculum vitae*, and documents describing the petitioner's various research projects. These materials show that the petitioner has engaged in biomedical research, but cannot show the

impact or influence of her work. There is no blanket waiver for biomedical researchers, and therefore the petitioner must do more than simply document the nature of her work.

On January 31, 2011, the petitioner submitted a supplement to the initial filing, including statements from the petitioner and five witnesses. The petitioner stated:

> For over eight years, I have dedicated my life to fighting HIV/AIDS and promoting vaccine development as a medical student, medical practitioner and a public health professional. I worked in an area where there was a dearth of expertise in West Africa, Nigeria, Ethiopia and India; conducting epidemiological research of vaccine preventable diseases and HIV/AIDS. **My application for national interest waiver is based on my exceptional ability and potential to contribute to ameliorating the scourge of the HIV epidemic and vaccine preventable diseases in the United States, improving outcomes in HIV infected patients and saving costs, and supporting the US government global health initiative, particularly the US president['s] Emergency Plan for AIDS Relief (PEPFAR). In particular, my expertise in working [with] minority and vulnerable people will help address the HIV/AIDS scourge among the African-American population and prevent childhood morbidity and mortality from diarrhea and pneumonia.**
>
> **. . . I played a major role in the analysis of epidemiologic studies for rotavirus vaccines with the Centers for Disease Control (CDC). This analysis sets a standardization [for] surveillance of vaccine preventable diseases prevalent in the US and around the world. . . .**
>
> **I have written papers, presented in international meetings, written opinion pieces and advocated for the HIV and vaccine programs in US and across the globe.** . . . My research projects have influenced the development of innovative strategies to control and manage HIV in the US, promote vaccine development and reduce infections in vulnerable and at-risk populations. . . .

(Emphasis in original.) Two of the five witnesses who provided letters know the petitioner through her early training at [redacted] Nigeria. The other three participated in the petitioner's training at [redacted] The letters follow the same basic format, providing an overview of the petitioner's research career with assertions about the significance of each step thereof. Each letter contains passages with bold type for emphasis (as does the petitioner's own introductory statement), and in some instances the letters share nearly identical language. For example, a letter signed by [redacted] contains the following passage:

> **[The petitioner]** was the best graduating student from the [redacted] College of Medicine. She led several research programs HIV [*sic*] and vaccine preventable diseases in collaboration with US agencies before obtaining her Master's in Public Health degree from [redacted] in 2010. She won the MPH

> field experience award and the Global Health Experience award and graduated as an outstanding MPH international student.

(Emphasis on the petitioner's name in original.) [redacted] signed a letter containing a nearly identical passage, again with the petitioner's name in bold type:

> **[The petitioner]** graduated as the best student from the [redacted] College of Medicine. She led several vaccination and infectious disease research programs before obtaining her Master's in Public Health degree from [redacted] University in 2010. She graduated as an outstanding MPH international student and won the MPH field experience award and the Global Health Experience award.

As similar as the above two passages are, there is even less difference between the above passage from [redacted] letter and the following passage in a letter signed by [redacted] public health analyst with the U.S. Department of Health and Human Services:

> **[The petitioner]** graduated as the best graduating student from the [redacted] University College of Medicine. She led several vaccination and infectious disease research programs before obtaining her Master's in Public Health degree from [redacted] University in 2010. She graduated as an outstanding MPH international student and won the MPH field experience award and the Global Health Experience award.

Letters signed by [redacted] do not contain the copied passage, but share the overall pattern of presenting an overview of the petitioner's research career, with selected passages (including the petitioner's name) emphasized with bold type. The letters all indicate that the petitioner's qualifications give her great potential for future contributions in her field.

On March 31, 2011, the director issued a notice of intent to deny the petition. The director stated that the petitioner had established the intrinsic merit and national scope of her occupation, but had not shown that she, individually, has played so significant a role in her field as to qualify for the waiver. The director acknowledged the petitioner's submission of witness letters, but also observed the factors (such as shared language) that suggested common origin of those letters. The director also found that those letters emphasized the petitioner's potential rather than her existing contributions. The director also stated that, in instances where the witness letters did assert the effect and influence of the petitioner's work, the record contained no independent corroborating evidence.

In response, counsel repeated the assertion that the petitioner has submitted compelling evidence of eligibility. The petitioner submitted a new personal statement that is mostly identical to her previous statement, with an added list of "my publications that have been influential in health reforms and articles were [*sic*] my papers were sited [*sic*]." The petitioner stated that various articles and

recommendations have "played a major role in progression of HIV Vaccine project," "been incorporated into emergency rapid assessment analysis of emergency preparedness protocols," and "been influential in the restructuring of funding of malaria projects in developing countries."

The petitioner claimed multiple citations of her published work, but none of the submitted references appeared in peer-reviewed journals to indicate that the petitioner's work has influenced the course of public health research. Instead, the petitioner documented references to her work on JHSPH materials such as IVAC's web site, a research protocol and an electronic slide presentation. This internal use of the petitioner's work does not demonstrate broader influence or impact.

In terms of external (non-JHSPH) materials, a fact sheet from World Pneumonia Day includes a "references" section. Reference 12 referred to a "Figure based on multiple Demographic and Health Surveys (DHS), cited in" an article by the petitioner and three other authors. A report from the [redacted] University cited the petitioner's "STI/HIV Management Services in Refugee Settings: A Review and Critique of Current Practices and Policies." The report cited the petitioner's paper (and a United Nations report from eight years earlier) to support the assertion that "interpersonal communication . . . has . . . been found to be cost effective with good organizational feasibility." Thus, neither reference appears to indicate or imply any contribution by the petitioner relating to vaccine development or related areas; the citations relate to demographic information.

The petitioner did not address the director's stated concerns about the similarities between the supposedly independent letters. Instead, the petitioner submitted three new letters containing stylistic similarities to the earlier letters, including the use of bold type for emphasis. Two of the letters are from prior witnesses. A new letter attributed to [redacted] consistently misspells his first name as [redacted] which compounds the director's stated concerns about the true origin of the letters. The letter contains further descriptions of the petitioner's current work. For example:

> **I am aware of [the petitioner's] evidenced** [*sic*] **based inputs in terms of researches towards Vaccines production, distribution and introduction, and this research has been used by decision makers in the public health field in the US. For example, she has conducted various researches which have contributed to the progression of the development of HIV Vaccine evidenced by one of her studies . . . (which she submitted with her application). This study has been instrumental in the progression of HIV Vaccine development from Phase II to Phase III and will hopefully lead to eventual production of HIV vaccines.**

(Emphasis in original.) The record does not identify the "decision makers in the public health field" or contain any corroboration of this vague claim.

A new letter signed by [redacted] includes the previous language about how the petitioner "graduated as the best graduating student from the [redacted] University College of Medicine," and discussed one of the petitioner's studies:

> The result of her study has been used by the HIV/AIDS department of the [redacted] City Health Department to develop guidelines to improve the approaches of antiretroviral drug compliance among the reproductive age group/youths. This has consequently been critical in scaling up the treatment, care and support of people living with HIV/AIDS in minority populations.

The letter indicated that another of the petitioner's studies "has been adopted by different institutions in the US such as International Rescue Committee, Baltimore City Health Department and Johns Hopkins Medical Institutions to improve policies, protocols and treatment approaches of sexually transmitted infections and HIV/AIDS among the refugee communities in United States." The petitioner submitted no evidence from the named entities to corroborate this claim or explain the extent of the petitioner's claimed influence.

The only new witness was [redacted] medical epidemiologist and the petitioner's supervisor at [redacted] letter mostly focused on ongoing projects, describing goals the petitioner hopes to achieve rather than existing accomplishments and influence. Where the letter discusses past work, the discussion is vague and general. For example:

> **She conducted studies to access individual country meningitis disease burden, the results of these study has** [*sic*] **helped to identify the major factors that affect meningitis disease and inform decision making in vaccine distributions thus, strengthening the immunization support in both United states globally** [*sic*].

(Emphasis in original.) The letter also contains the following passage:

> [The petitioner] graduated as the best student from the [redacted] University College of Medicine Nigeria. She obtained her Master's in Public Health degree from the prestigious [redacted] iversity in 2010 were [*sic*] she graduated as an outstanding MPH international student, winning the MPH field experience award and the Global Health Experience award.

The director denied the petition on May 24, 2011, stating that the petitioner had failed to corroborate witnesses' claims about the implementation of the petitioner's work. The director also found the petitioner's citation evidence not to be persuasive.

On appeal, counsel contends that the "decision is internally inconsistent." Counsel, however, does not elaborate upon this claim or identify the purported inconsistency.

Counsel asserts that the petitioner "submitted sub[s]tantial documentation in support of her case, namely; a detailed statement, third party testimony in the form of letters from other scientists, her publications as well as other publications showing that her research work has been cited by other scientists." The director did not dispute that the petitioner has done productive work in her field.

Rather, the petitioner's submissions do not have the corroborative weight that counsel contends they do. The petitioner's own statements and publications do not self-evidently establish the influence of the petitioner's work. The witness letters are problematic because of their uncertain authorship, an issue that counsel has never addressed.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The letters refer to the adoption of the petitioner's work by various private and governmental organizations, but the record contains nothing from those organizations to confirm those claims.

Counsel states that the director "applied an incorrect legal standard" because "[t]he denial decision places a higher burden than the law requires." Counsel asserts: "[t]he evidence submitted to date has conclusively established that [the petitioner] significantly exceeds the norm in impact and effect of her biomedical portfolio. . . . The impact of her research is indisputably greater than that of others with comparable experience." The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's use of such words as "conclusively" and "indisputably" does not invest the petitioner's claims and evidence with those traits.

Counsel lists a number of unpublished AAO appellate decisions approving national interest waivers. Counsel does not provide any of the facts from the cited decisions except to identify the occupations of the respective beneficiaries. Counsel fails to explain how these unpublished decisions are relevant to the present proceeding. The decisions show that workers in a wide range of fields can qualify for the waiver, but the director never stated that the petitioner's occupation disqualified her

for the waiver. At issue is not what the petitioner does, but the significance of what the petitioner has so far accomplished.

Counsel also cites a 1992 appellate decision "which enumerates seven factors for the waiver, among which [is] improving health care in the United States." While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. None of the cited decisions are published precedents. The decision listing "seven factors" appeared more than five years before *NYSDOT*, which has the force of binding precedent.

In sum, the petitioner has submitted ample evidence of the nature of her work, but no reliable objective evidence of the impact or influence of that work. The petitioner has not addressed the director's concerns about the petitioner's evidence, relying instead on counsel's insistence that the evidence as submitted is so conclusive that only adjudicative error or bias can account for the denial of the petition. Counsel has, however, made no specific or persuasive allegation of such error.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.